Bavani a/p Samoganazan v Yang Berhormat Menteri Sumber Manusia Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–139–04 OF 2021
NOORIN BADARUDDIN J
23 DECEMBER 2022

Civil Procedure — Judicial review — Application for — Application for mandamus and certiorari — Employee employed as security guard — Employee failed mandatory Security Filtering — Employer terminated employee's employment — Minister refused to refer dispute over employee's dismissal to Industrial Court pursuant to s 20(3) of Industrial Relations Act 1967 — Whether Minister had acted in excess of power — Whether reasons for failing Security Filtering ought to be provided to employee — Whether employee ought to be afforded fair trial — Whether employee's complaint on unfair dismissal ought to be referred to Industrial Court — Whether application for certiorari and mandamus against decision of Minister ought to be allowed

Labour Law — Reference — Reference by Minister — Employee employed as security guard — Employee failed mandatory Security Filtering — Employer terminated employee's employment — Minister refused to refer dispute over employee's dismissal to Industrial Court pursuant to s 20(3) of Industrial Relations Act 1967 — Whether Minister had acted in excess of power — Whether reasons for failing Security Filtering ought to be provided to employee — Whether employee ought to be afforded fair trial — Whether employee's complaint on unfair dismissal ought to be referred to Industrial Court — Whether application for certiorari and mandamus against decision of Minister ought to be allowed — Evidence Act 1950 s 124 — Federal Constitution art 5(1) — Industrial Relations Act 1967 s 20(1) & (3) — Official Secrets Act 1972 — Private Agencies Act 1971

The applicant was employed as a security guard by a company known as Wise Star Security Sdn Bhd ('Wise Star'). Under the employment of Wise Star, the applicant had undergone and passed the mandatory Security Filtering conducted by the third respondent. However, when the applicant was absorbed as the second respondent's employee, she was informed that she had failed the Security Filtering and the third respondent did not provide any reasons behind the applicant's failure in the Security Filtering process. Consequently, the applicant's service was terminated by the second respondent. The applicant then lodged a complaint to the Minister of Human Resource ('the first respondent' or 'the Minister') under s 20(1) of the Industrial Relations Act

1967 ('the IRA'). Subsequent thereto, a conciliation meeting was conducted but at the end of the meeting, no settlement was achieved between the parties. Despite such outcome, the first respondent refused to refer the representation made by the applicant in relation to her dismissal to the Industrial Court for adjudication under s 20(3) of the IRA. Dissatisfied with the first respondent's decision, the applicant filed the present application ('the application'), inter alia, for an order of certiorari to quash the decision of the first respondent, and for an order of mandamus for the first respondent to refer the applicant's representation to the Industrial Court. The respondents submitted that the Security Filtering conducted by the police was classified as secret under the Official Secrets Act 1972 and as such any communication or disclosure of related information was prohibited.

Held, allowing the application:

(1) In deciding not to refer the applicant's representation merely on the ground that she did not pass the Security Filtering, the Minister had failed to exercise his discretion in giving effect of settling the dispute. It must be borne in mind that the Minister was merely exercising an administrative duty and not a judicial function and he could not delve into the merits of the dispute and taken upon him the determination of the lis, which would be tantamount to excess of the power conferred on him. The dispute herein contained questions of facts and law or mixed facts and law which must be left to the Industrial Court to decide (see paras 18 & 23).

(2) In any event, although there was no express provision in the Private Agencies Act 1971 stipulating the duty on the part of the third respondent to give reason for the failure of candidates in the Security Filtering, there was a duty on the third respondent to give reasons as to why the applicant did not get through the Security Filtering as the third respondent's decision had affected the applicant's livelihood. It must be emphasized that the applicant had no previous criminal record and had obtained approval from the third respondent previously (see para 25).

(3) At this juncture, what the applicant sought for was the reason as to her failure in the Security Filtering. She was not asking for any confidential document to be disclosed. Further, s 124 of the Evidence Act 1950 stated that the court may require the head of the department or officer to certify in writing whether such disclosure would be detrimental to the public interest and if the head of department certified that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications (see para 26).

(4) The applicant must be afforded with a fair trial, a concept which necessitated the observance of the 'equality of arms' principle. In the present case, the applicant had been deprived of her livelihood under

art 5(1) of the Federal Constitution when she was terminated from her employment without knowing the reason for her failure of the Security Filtering. In placing the importance of fairness and equality and natural justice, the court held that the applicant's complaint on unfair dismissal ought to be referred to the Industrial Court (see paras 28–29).

[Bahasa Malaysia summary

Pemohon telah diambil bekerja sebagai pengawal keselamatan oleh sebuah syarikat yang dikenali sebagai Wise Star Security Sdn Bhd ('Wise Star'). Di bawah penggajian Wise Star, pemohon telah menjalani dan lulus Tapisan Keselamatan mandatori yang dijalankan oleh responden ketiga. Walau bagaimanapun, apabila pemohon diserap sebagai pekerja responden kedua, dia telah dimaklumkan bahawa dia telah gagal dalam Tapisan Keselamatan tersebut dan responden ketiga tidak memberikan apa-apa sebab di sebalik kegagalan pemohon dalam proses Tapisan Keselamatan tersebut. Akibatnya, perkhidmatan pemohon telah ditamatkan oleh responden kedua. Pemohon kemudiannya membuat aduan kepada Menteri Sumber Manusia ('responden pertama' atau 'Menteri') di bawah s 20(1) Akta Perhubungan Perusahaan 1967 ('APP'). Selepas itu, mesyuarat perdamaian telah dijalankan tetapi pada akhir mesyuarat, tiada penyelesaian dicapai antara pihak-pihak. Walaupun keputusan sedemikian, responden pertama enggan merujuk representasi yang dibuat oleh pemohon berhubung dengan pemecatannya ke Mahkamah Perusahaan untuk adjudikasi di bawah s 20(3) APP. Tidak berpuas hati dengan keputusan responden pertama, pemohon memfailkan permohonan semasa ('permohonan'), antara lain, untuk perintah certiorari untuk membatalkan keputusan responden pertama, dan untuk perintah mandamus untuk responden pertama merujuk representasi pemohon ke Mahkamah Perusahaan. Responden-responden berhujah bahawa Tapisan Keselamatan yang dijalankan oleh polis diklasifikasikan sebagai rahsia di bawah Akta Rahsia Rasmi 1972 dan oleh itu apa-apa komunikasi atau pendedahan maklumat berkaitan adalah dilarang.

Diputuskan, membenarkan permohonan:

(1) Dalam membuat keputusan untuk tidak merujuk representasi pemohon semata-mata atas alasan dia tidak lulus Tapisan Keselamatan, Menteri telah gagal menggunakan budi bicaranya dalam memberikan kesan kepada penyelesaian pertikaian. Perlu diingat bahawa Menteri hanya menjalankan tugas pentadbiran dan bukan fungsi kehakiman dan dia tidak boleh menyelidiki merit pertikaian tersebut dan menentukan sendiri keputusan kes, yang mana ini akan terjumlah kepada melebihi kuasa yang diberikan kepadanya. Pertikaian di sini mengandungi persoalan fakta dan undang-undang atau campuran fakta dan undang-undang yang perlu diserahkan kepada Mahkamah Perusahaan untuk membuat keputusan (lihat perenggan 18 & 23).

(2) Dalam apa-apa keadaaan sekalipun, walaupun tiada peruntukan nyata dalam Akta Agensi Persendirian 1971 yang menetapkan kewajipan di pihak responden ketiga untuk memberi sebab kegagalan calon dalam Tapisan Keselamatan, terdapat kewajipan ke atas responden ketiga untuk berikan alasan mengapa pemohon tidak berjaya melepasi Tapisan Keselamatan kerana keputusan responden ketiga telah menjejaskan mata pencarian pemohon. Perlu ditegaskan bahawa pemohon tidak mempunyai rekod jenayah lampau dan telah mendapat kelulusan daripada responden ketiga sebelum ini (lihat perenggan 25).

(3) Pada ketika ini, perkara yang diinginkan oleh pemohon ialah sebab kegagalannya dalam Tapisan Keselamatan tersebut. Dia tidak meminta apa-apa dokumen sulit didedahkan. Selanjutnya, s 124 Akta Keterangan 1950 menyatakan bahawa mahkamah boleh menghendaki ketua jabatan atau pegawai untuk memperakui secara bertulis sama ada pendedahan tersebut akan memudaratkan kepentingan awam dan jika ketua jabatan memperakui bahawa pendedahan tersebut tidak akan memudaratkan kepentingan awam, maka pegawai hendaklah mendedahkan komunikasi tersebut (lihat perenggan 26).

(4) Pemohon perlu diberikan perbicaraan yang adil, satu konsep yang memerlukan pematuhan prinsip 'equality of arms'. Dalam kes ini, pemohon telah dinafikan mata pencariannya di bawah perkara 5(1) Perlembagaan Persekutuan apabila dia diberhentikan daripada pekerjaannya tanpa mengetahui sebab kegagalannya dalam Tapisan Keselamatan tersebut. Dalam meletakkan kepentingan keadilan dan kesaksamaan dan keadilan semula jadi, mahkamah berpendapat bahawa aduan pemohon mengenai pemecatan yang tidak adil harus dirujuk kepada Mahkamah Perusahaan (lihat perenggan 28–29).]

Cases referred to

Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors [2007] 3 MLJ 1; [2007] 2 CLJ 97, FC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481, CA (refd)

Mohamad Hassan Zakaria v Universiti Teknologi Malaysia [2017] 6 MLJ 586; [2017] 4 ILR 430, CA (refd)

Uniqlo (M) Sdn Bhd v Ketua Pengarah Kastam dan Eksais [2021] 2 MLJ 120, CA (refd)

Legislation referred to

Evidence Act 1950 s 124
Federal Constitution art 5(1)
Industrial Relations Act 1967 s 20, 20(1), (3)
Official Secrets Act 1972
Private Agencies Act 1971

SP Devi (A Rajadurai P Kuppusamy & Co) for the applicant.
Iznie Elynna bt Zainal (Senior Federal Counsel, Attorney General's Chambers) for the first and third respondents.

Noorin Badaruddin J:

[1] This is an application for, inter alia, an order of certiorari to quash the decision of the first respondent dated 27 January 2021 in refusing to refer the representation made by the applicant to the Industrial Court for adjudication under s 20(3) of the Industrial Relations Act 1967 and for an order of mandamus for the Minister to refer the applicant's representation to the Industrial Court.

BACKGROUND FACTS

[2] The applicant was working as a security guard since 2009 with a company Wise Star Security Sdn Bhd where she was directed to be stationed at Bukit Bintang 1 and 2 Petaling Jaya, School ('the school').

[3] As a security guard, the applicant was required to go through a mandatory security filtering for the purpose of her employment contract. At the material time she was informed by the company Wise Star Security Sdn Bhd that she had passed the security filtering requirement conducted by the third respondent.

[4] On 1 January 2020 the second respondent took over all contracts relating to the security guards at the school and the applicant was absorbed as the second respondent's employee via letter of offer dated 1 January 2020.

[5] The second respondent then took the applicant for security filtering at the National Registration Department in Petaling Jaya around January 2020 and from then on the applicant did not receive any reply.

[6] On 18 April 2020, the second respondent handed over a letter of termination of employment to the applicant wherein the applicant was informed that the second respondent had received the decision from the third respondent that the applicant had failed the security filtering and therefore her termination of service takes effect from 19 April 2020.

[7] The applicant then lodged her complaint with the first respondent pursuant to s 20(1) of the Industrial Relations Act 1967 on 12 May 2020. A conciliation meeting was held between the applicant and the second respondent but no settlement was achieved thereafter.

[8] In February 2021, the applicant received a letter from the first respondent stating, inter alia, as follows:

> 2. Dimaklumkan bahawa Y.B. Menteri Sumber Manusia telah memutuskan di bawah subseksyen 20(3) Akta Perhubungan Perusahaan 1967 bahawa representasi mengenai pembuangan kerja tuan/puan *tidak wajar* dirujuk ke Mahkamah Perusahaan.

SUMMARY OF THE APPLICANT'S CONTENTIONS

[9] Summarily, it is the applicant's position that she was dismissed solely on the ground that the third respondent had decided that she had failed the security filtering and that the second respondent has failed to inquire into the reason for her failure as there was no reason given by the third respondent for their decision. Accordingly, the second respondent is contended to have acted arbitrarily when it decided to rely on the reason provided by the third respondent without due inquiry. The applicant had written a letter to the third respondent to find the reason for rejection but she received no response from the latter.

[10] According to the applicant, there are merits in her representation as there are disputes of facts and as such the matter warranted a reference to the Industrial Court for adjudication.

SUMMARY OF THE RESPONDENTS' CONTENTIONS

[11] On behalf of the first respondent, the learned federal counsel argues that since the applicant has failed the security filtering, it is a clear cut case that the first respondent's decision in not referring the applicant's representation to the Industrial Court is reasonable.

[12] It is argued that there is no injustice caused on the applicant in being terminated from her employment as the second respondent had adhered to the guidelines under the law and there is no question of facts or law that need to be determined by the Industrial Court since the applicant has failed in the security filtering which is a condition for employment of security guards. Further, there is no duty imposed on the third respondent to give reasons as to why the applicant has failed in the security filtering.

[13] According to the learned federal counsel, the security filtering conducted by the Royal Police of Malaysia is classified as official secret and the third respondent is not compelled to disclose the reasons as to the applicant's failure in passing the security filtering process.

FINDINGS

[14] Before making a finding and a conclusion in his decision, the Minister needs to consider all the relevant facts supplied and tendered to him (see *Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2007] 3 MLJ 1; [2007] 2 CLJ 97).

[15] It is trite that the court in reviewing the decision made by the Minister is under a duty to conduct a meticulous examination of the facts placed before the Minister at the material time. It means that there must be an objective examination of the factual matrix available before the Minister in order to ascertain whether a reasonable person similarly circumstanced would have arrived at the decision which the Minister had done (see again *Exxon Chemical (M) Sdn Bhd*).

[16] It is clear that the dispute between the applicant and her employer, the second respondent cannot be resolved by the Minister. Gopal Sri Ram JCA (as he then was) in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 in referring to the ambit of the Minister's discretion under s 20 of the Industrial Relations Act 1967 had stated that the first question which the Minister ought to ask is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at. Secondly, the Minister has to ask whether the representation objectively speaking is frivolous and vexatious (see: *Hong Leong Equipment Sdn Bhd*).

[17] It is clear that the only reason as to why the applicant's employment was terminated is solely on the ground that the third respondent has decided that the applicant has failed the security filtering. No other reasons were given by the second respondent and no reason was also given by the third respondent as to why the applicant failed the security filtering.

[18] It is of the considered view that in deciding not to refer the applicant's representation merely on the ground that she did not pass the security filtering, the Minister has failed to exercise his discretion in giving effect of settling the dispute. It must be borne in mind that the Minister is merely exercising an administrative duty and not a judicial function and he cannot delve into the merits of the dispute and taken upon him the determination of the lis, which will tantamount to excess of the power conferred on him.

[19] This court finds that from the applicant's affidavit, there are disputes of facts arising between the applicant and the second respondent as the employer and these facts were placed before the Minister. These disputed facts relate to the real reason as to why the applicant was terminated.

A **[20]** The applicant has disclosed that she has no previous criminal record and that she has been working as a security guard for more than ten years and prior to the event leading to her termination she had obtained approval from the third respondent to work as a security guard.

B **[21]** Pertinently, the applicant's right to livelihood is affected by the decisions of the second and third respondents and as such the applicant ought to have been given a right to be heard as to why she had failed the security filtering this time around when nothing can be shown that her previous clean record was smeared by any apparent incidents except for some kind of displeasure on the C part of the second respondent towards the applicant who had lodged police reports relating to some acts of some other co-workers of hers whereby the applicant was asked by the second respondent to withdraw the police report to which the applicant had abide.

D **[22]** The applicant has further averred that on 17 March 2020 she had received her appraisal from the second respondent indicating that the second respondent was not satisfied with her performance in discharging her duty. Amongst others, the second respondent has stated that the applicant's conduct E in reporting straight to the headmaster of the school without the knowledge of the second respondent is amongst the unsatisfactory conduct of the applicant.

[23] Having regards to the allegations of facts by the applicant, it is of the considered view that the Minister cannot take a short cut route by deciding that F the applicant's representation does not warrant a reference to the Industrial Court solely on the ground that she has failed the security filtering without appreciating procedural fairness which must be adhered to. In exercising his discretion, it is not within the purview of the Minister to adjudicate on the dispute arising between the applicant as the employee and the second G respondent as the employer as the dispute herein contain questions of facts and law or mixed facts and law which must be left to the Industrial Court to decide.

[24] Even the question as to whether the third respondent is to give reason for its decision as to the failure of the applicant in the security filtering is a H question of law which must be addressed by the Industrial Court first. It must be borne in mind that the Apex Courts have in several recent decisions decided that a decision maker has to give reasons in arriving at his/her decision even in the absence of any provisions in the statute requiring the same as it can be an additional constituent of the concept of fairness (see *Uniqlo (M) Sdn Bhd v* I *Ketua Pengarah Kastam dan Eksais* [2021] 2 MLJ 120).

[25] In any event, it is of the considered view that although there is no express provision in the Private Agencies Act 1971 stipulating the duty on the part of the third respondent to give reason for the failure of candidates in the

security filtering, there is a duty on the third respondent to give reasons as to why the applicant did not get through the security filtering as the third respondent's decision had affected the applicant's livelihood. It must be emphasized that the applicant has no previous criminal record and had obtained approval from the third respondent previously.

[26] Learned federal counsel submitted that the security filtering conducted by the police is classified as secret under the Official Secrets Act 1972 and as such any communication or disclosure of related information is prohibited. It is of the considered view that at this juncture, what the applicant is seeking is the reason as to her failure in the security filtering. She is not asking for any confidential document to be disclosed. Furthermore, s 124 of the Evidence Act 1950 provides that the court may require the head of the department or officer to certify in writing whether or not such disclosure would be detrimental to the public interest and if the head of department certifies that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications (see s 124 of the Evidence Act 1950).

[27] It is important to note that the Court of Appeal in the case of *Mohamad Hassan Zakaria v Universiti Teknologi Malaysia* [2017] 6 MLJ 586; [2017] 4 ILR 430, Mary Lim JCA (as Her Ladyship then was) in her illuminating judgment relating to the giving of reasons by the authorities had stated:

> ... Like the circumstances in *Majlis Perbandaran Pulau Pinang*, *the circumstances in the present appeal 'to put it mildly, ... were such as to cry out for an explanation ...' from the respondent. Not only does the trend call for an increased openness in matters of Government and administration, it is quite evidently a matter of fairness that the respondent should have given reasons for its decision*. Thus, when the learned judge said that he found the decision made under such circumstances, with all the reasons and grounds offered by the appellant to '... not constitute 'Wednesbury unreasonableness', we are entirely perplexed as to how His Lordship could have arrived at such a conclusion. With respect, with and on the reasons and grounds offered by the appellant, and with his wife's similarly circumstanced application approved, we find that this was clearly a case where the decision reached was quite clearly unreasonable. No reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
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> [62] *Hence, at the time of rejection of the application as well as the appeals, the non-provision of reasons simply on the ground that there was no duty expressed under the Act and SPP Bil 4/2003, is certainly injurious to the respondent's case*. In the absence of reasons, having regard to the particular circumstances of s 12(1) of the Act, we are prepared to say that the respondent in fact, has no valid reason for rejecting the appellant's application. On that ground alone, the application for certiorari ought to and must be granted.

[28] It is of the considered view that the applicant must be afforded with a fair trial, a concept which necessitates the observance of the 'equality of arms' principle. She cannot be shut out from the fair trial solely on the ground that she has failed to fulfill one requirement by the authority for she is deprived of knowing the reason as to why she is said to have failed to fulfill the requirement which she had once successfully passed.

[29] At the risk of repetition, the applicant had been deprived of her livelihood under art 5(1) of the Federal Constitution when she was terminated from her employment without knowing the reason for her failure of the security filtering. In placing the importance of fairness and equality and natural justice, the applicant's complaint on unfair dismissal must be referred to the Industrial Court.

CONCLUSION

[30] Premised on the above, the application was therefore allowed.

Application allowed.

Reported by Dzulqarnain Ab Fatar